

**United States Department of Labor
Employees' Compensation Appeals Board**

O.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Phoenix, AZ, Employer**

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**Docket No. 09-483
Issued: October 8, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 9, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' October 22, 2008 decision denying waiver of recovery of an overpayment of compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly denied waiver of recovery of a \$20,221.97 overpayment of compensation.

FACTUAL HISTORY

This case is before the Board for the third time. In an August 4, 2004 decision, the Board reversed an Office decision that terminated appellant's compensation for wage loss, effective January 31, 2003, based on his refusal to accept suitable employment.¹ Following the Board's

¹ Docket No. 04-766 (issued August 4, 2006).

decision, the Office found that retroactive compensation was due appellant from February 1, 2003.² In a September 4, 2007 decision, the Board affirmed the Office's November 8, 2006 decision with respect to the finding that appellant received overpayments of compensation in the amounts of \$9,870.26 and \$20,221.07 and in the finding of fault and recovery of the under-deduction of health premiums in the amount of \$9,870.26. The Board set aside the finding of fault for the overpayment and recovery of a schedule award in the amount of \$20,221.07.³ The record indicated that appellant had received two schedule awards for the right upper extremity several years apart and for different claims. The Board determined that the Office did not adequately explain how appellant should have known he was not entitled to the second schedule award payment and, thus, the evidence was not sufficient to determine he was at fault in the creation of the overpayment.⁴ The Office had already recovered the total amount of the overpayments, \$30,092.23 (\$9,870.26 plus 20,221.97) by reducing the amount of retroactive benefits. The findings of fact and conclusions of law from the prior decisions are incorporated herein by reference.

A hearing was held on March 20, 2008, regarding appellant's eligibility for waiver pursuant to the Board's September 4, 2007 decision. He argued that he was not at fault in creating the overpayment and that he did not receive disability compensation during the period April 30, 1992 to June 18, 1993, when the schedule award was received and believed he was underpaid as he should have received schedule award and disability compensation concurrently. Appellant further stated that him and his family was behind in their house payment and was in the process of foreclosure. The Office hearing representative advised him of the Office's standards for considering waiver and allowed him 30 days to submit additional financial evidence.

On April 21, 2008 the Office received an April 15, 2008 letter from appellant, reiterated his argument that the overpayment did not occur as he was entitled to schedule award and disability compensation concurrently. Appellant also provided information on his current income and expenses. He submitted a December 1, 2007 mortgage loan statement, which showed his account was past due and a March 25, 2008 letter from the bank, which indicated foreclosure proceedings had been initiated. In an undated loan application, appellant reported monthly income as \$4,875.00.⁵ His assets totaled \$155,093.00 with liabilities of \$118,430.70.⁶

² On December 10, 2004 appellant changed his election so that he would receive Office benefits retroactive to February 1, 2003. The Office placed him on the periodic rolls effective January 23, 2005 and paid appropriate compensation to his dependent spouse through electronic fund transfer.

³ Docket No. 07-833 (issued September 4, 2007).

⁴ When the Office issued the second schedule award, it failed to take into account an earlier award paid for the right upper extremity and thus overpaid appellant in the amount of \$20,221.97.

⁵ Appellant's monthly income was comprised of \$977.00 in social security, \$617.00 in retirement/pension, \$400.00 in rental property, \$275.00 from "other" and \$2,606.00 in unemployment/disability compensation.

⁶ The assets included appellant's primary residence valued at \$45,000, rental real estate valued at \$110,000, three automobiles with no value listed, a checking account with \$84.00, land valued at \$3,000 and a VAC license worth \$6,000. Liabilities comprised the amount owed on his primary residence (\$33,000) and rental property (\$84,000) and on the VAC license (\$1430.70).

Appellant's reported monthly expenses were \$1,223.10 for mortgages on his two homes, \$800.00 for credit cards, \$579.00 for utilities,⁷ \$400.00 for food, \$375.00 for automobile insurance, gasoline and maintenance, \$350.00 for medical expenses and \$472.20 in other expenses.⁸

Appellant had previously submitted an overpayment recovery questionnaire dated September 13, 2005 in which he listed his monthly income as \$4,946.00, total monthly expenses of \$4,694.00⁹ and funds of \$3,851.03. With regard to the overpayment resulting from the schedule award, he stated that because the schedule awards were for two different conditions, his carpal tunnel and his shoulder condition, he was not reasonably aware that he was not entitled to the full amount of the second schedule award. Appellant argued that taking the awards away and long delay in paying back the compensation caused a huge financial hardship as the interest rates on his credit cards were raised. He advised that his wife had used the credit cards to remodel their home, which she would not have done had they known compensation would be stopped.

By decision dated October 22, 2008, an Office hearing representative denied waiver of recovery of the overpayment. She found that the overpayment of \$20,221.97 remained correct as previously established. The hearing representative additionally found that appellant has sufficient income and assets to repay the overpayment and there was no indication that the overpayment led to detrimental reliance.

On appeal, appellant argues that the Office hearing representative did not take into account that his wife lost her job in December 2007 and their condominium went into foreclosure. He stated they were unsuccessful in selling the condominium but were able to rent it for \$400.00 a month in March 2008, but they pay the remainder of the \$780.00 monthly mortgage. Appellant noted the value of his three vehicles. He reiterated that his credit card debt arose from his wife using the credit cards to remodel the condominium in December 2002, as they thought compensation was forthcoming. Appellant indicated that they could not pay off the debt once the compensation stopped and they accrued high interest rates on their credit cards.

LEGAL PRECEDENT

The Office may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.¹⁰ If the Office finds that the recipient of an overpayment was not at fault, repayment will still be required unless (1) adjustment or recovery of the overpayment would defeat the purpose of the Federal

⁷ This included electricity/heating/gas, telephone/cell phone/beeper, water/sewage and internet and cable/satellite TV.

⁸ This included \$40.00 in professional/union/association dues, \$266.20 in church/charitable contributions, \$50.00 for clothes/shoes and \$116.00 for a VAC license.

⁹ This included: \$1,402.00 for mortgage and association fees, \$300.00 for food, \$100.00 for clothing; \$920.00 for utilities, \$200.00 for other expenses and \$1,672.00 for payments to creditors. The Board notes that this adds to \$4,594.00 as opposed to the \$4,694.00 stated.

¹⁰ 20 C.F.R § 10.433(a).

Employees' Compensation Act or (2) adjustment or recovery of the overpayment would be against equity and good conscience.¹¹

Recovery will defeat the purpose of the Act if both: (a) The individual from whom recovery is sought needs substantially all of his current income (including periodic benefits under the Act) to meet current ordinary and necessary living expenses; and (b) The individual's assets do not exceed the resource base (including but not limited to cash, the value of stocks, bonds, savings accounts, mutual funds) of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. The first \$4,800.00 or more, depending on the number of claimant's dependents, is also exempted from recoupment as a necessary emergency resource. If an individual has current income or assets in excess of the allowable amount, a reasonable repayment schedule can be established over a reasonable, specified period of time. It is the individual's burden to submit evidence to show that recovery of the overpayment would cause the degree of financial hardship sufficient to justify waiver.¹² An individual is deemed to need substantially all of his or her income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹³

Recovery of an overpayment is considered to be against equity and good conscience when any individual who received an overpayment would experience severe financial hardship in attempting to repay the debt.¹⁴ Recovery of an overpayment is also considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes her position for the worse.¹⁵

Section 10.438 of the regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by the Office. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of the Act or be against equity and good conscience. Failure to submit the requested information within 30 days of the request shall result in the denial of waiver.¹⁶

ANALYSIS

The Office denied waiver of recovery of the \$20,221.97 overpayment as recovery of the overpayment would not defeat the purpose of the Act or be against equity and good conscience.

¹¹ 20 C.F.R. § 10.434.

¹² Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a(1) (October 2004).

¹³ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a)(1)(b) (October 2004). See *Sherry A. Hunt*, 49 ECAB 467, 473 (1998).

¹⁴ 20 C.F.R. § 10.437(a).

¹⁵ *Id.* at § 10.437(b).

¹⁶ *Id.* at § 10.438.

While appellant took issue with the fact that the overpayment occurred, the Board, in its September 4, 2007 decision affirmed the fact and amount of the \$20,221.97 overpayment he received. The Office hearing representative did not reopen this matter in her October 22, 2008 decision. The Board's finding and decision in this matter became final upon the expiration of 30 days from the date of the issuance of the Board's March 4, 2003 decision and order.¹⁷ The matter is *res judicata* and is not subject to further consideration by the Board on this appeal.¹⁸

Although appellant was found without fault in the matter of the overpayment repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.

For waiver under the "defeat the purpose of the Act" standard, appellant must show both that he needs substantially all of his current income to meet current ordinary and necessary living expenses and his assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent.

The Office accepted all the financial disclosures appellant provided on April 21, 2008 in a loan application, which he indicated stated his income and expenses. Appellant listed his monthly income as \$4,875.00 and monthly expenses as \$4,199.30.¹⁹ As his monthly income exceeds his monthly expenses by more than \$50.00, he does not need substantially all of his current income to meet current ordinary and necessary living expenses.²⁰ Since appellant's monthly income exceeds his monthly expenses by more than \$50.00, it is not necessary to consider his asset base under the "defeat the purpose of the Act" standard. Consequently, he is not eligible for waiver under the "defeat the purpose of the Act" standard.

The record also does not support a finding that recovery would be against equity and good conscience. Appellant has alleged recovery of the overpayment led to detrimental reliance. He argued his wife relied on the overpayment to remodel their home and they incurred credit card debt due to increased interest rates as they could not pay off such expenses. While appellant may have incurred credit card debt due to remodeling expenses, he has not met his burden in showing that he changed his position for the worse as he has not shown that he suffered any loss. His wife simply converted the money into a different form. Conversion of a liquid asset into real or personal property does not constitute a loss. Additionally, appellant did not lose a valuable right as he retained ownership interest in the home where the improvements were made.²¹ Thus,

¹⁷ 20 C.F.R. § 501.6(d).

¹⁸ *Hugo A. Mentink*, 9 ECAB 628 (1958). In the absence of further review by the Office on the issue addressed by a Board decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

¹⁹ This included mortgages for two homes and expenses for credit cards, utilities, food, automobile insurance, gasoline and maintenance, medical expenses and drug copays, VAC license and other miscellaneous expenses, which included professional/association dues, church/charitable contributions and new clothes/shoes.

²⁰ See *supra* note 13.

²¹ Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(b)(3) (October 2004).

the Office properly found that he did not establish that recovery would be against equity and good conscience.

As the evidence fails to support that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion in denying a waiver of recovery of the overpayment of \$20,221.97.

While appellant argued on appeal, that his wife lost her job in December 2007, he bears the responsibility to provide information about income, expenses and assets.²² The Office based its decision on the financial evidence provided by, his additional contentions reiterate arguments previously made before the Office and are discussed above.

CONCLUSION

The Board finds that the Office properly denied waiver of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2008 decision of the Office of Workers Compensation Programs is affirmed.

Issued: October 8, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²² 20 C.F.R. § 10.438.